In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-74

JAMES R. HOFFA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this, his fifth post-conviction proceeding, petitioner contends that his motion to vacate sentence under 28 U.S.C. 2255, alleging the commission of perjury by a government witness, was improperly denied without an evidentiary hearing. He further argues that the motion should have been decided by a judge other than the trial judge. Finally, he contends that the court improperly denied his motion to depose the government witness who had allegedly committed perjury.

In 1964, petitioner and others were convicted in the Eastern District of Tennessee of jury tampering in connection with a 1962 criminal prosecution of petitioner in the Middle District of Tennessee.[1] Their convictions,

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[1] On December 22, 1972, petitioner's sentence on these and other charges was commuted, pursuant to a grant of executive clemency.

and the denial of their motions for a new trial, were affirmed on appeal. 349 F. 2d 20 (C.A. 6), affirmed, 385 U.S. 293. Subsequent motions for a new trial, based on assertions of newly discovered evidence, were denied, and the denials were affirmed on appeal. 247 F. Supp. 692 (E.D. Tenn.), affirmed, 376 F. 2d 1020 (C.A. 6), certiorari denied, 389 U.S. 859; 247 F. Supp. 692, 698 (E.D. Tenn.), affirmed, 382 F. 2d 856 (C.A. 6), certiorari denied, 390 U.S. 924.

Petitioner then filed a further motion for a new trial based on an assertion of newly discovered evidence of unlawful electronic eavesdropping. This motion was also denied, 268 F. Supp. 732 (E.D. Tenn.); the denial was affirmed on appeal, 398 F. 2d 291 (C.A. 6), and a petition for a writ of certiorari was filed (No. 546, O.T. 1968). In response to that petition, the government advised this Court that conversations in which petitioner and a co-defendant had participated, which bore no arguable relevance to petitioner's prosecution, had been overheard during the course of an electronic surveillance directed against others. The Court remanded the case (*sub nom. Giordano* v. *United States*, 394 U.S. 310) for further proceedings in conformity with its decision in *Alderman* v. *United States*, 394 U.S. 165. After an evidentiary hearing, at which the records of all overheard conversations involving petitioners were produced, the district court again denied the motion for a new trial. 307 F. Supp. 1129 (E.D. Tenn.). This decision was affirmed, 437 F. 2d 11 (C.A. 6), certiorari denied, 402 U.S. 988.

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to six and one-half years' imprisonment and he was released from prison. The grant of clemency was conditioned upon petitioner's non-participation in the management of a labor union until March 6, 1980.

On May 24, 1971, petitioner filed in the district court the present motion to vacate sentence pursuant to 28 U.S.C. 2255. Petitioner alleged that a government witness, Edward G. Partin, had perjured himself at trial, that the government had knowingly used his perjured testimony, and that the principles enunciated in *Napue* v. *Illinois*, 360 U.S. 264, required that the judgment of conviction be set aside. The motion was based on the disclosure made at the *Alderman* hearing that, prior to the return of the indictment against petitioner and his co-defendants, a recording device was installed in an automobile of Partin and that certain conversations Partin had with petitioner's co-defendant, Ewing King, were recorded (Pet. App. A-3). Petitioner alleged that the fact that this event transpired proved that certain testimony given by Partin at trial was false (Pet. 8-9).[2]

The district court in an exhaustive opinion (Pet. App. A-8 to A-30), upon which we rely here, examined the allegedly false statements and concluded that petitioner's claims were conclusively refuted by the record. The Section 2255 motion was, therefore, denied without a hearing. The court of appeals affirmed the finding of the district court regarding "the allegations of perjury" (Pet. App. A-4) and, as did the district court (Pet. App. A-29, A-30), rejected for the *second* time the claim that the failure to disclose the existence of "the Partin-

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[2] Petitioner did not allege that any specific testimony given by Partin at trial would be contradicted by the contents of the transcript of the conversation (Pet. 8-9). Moreover, as the district court found, "the witness Partin was never asked a question in the course of criminal trial that would call for a response disclosing the Partin-King recording and the witness never gave a response that would deny the existence of that recording" (Pet. App. A-29).

King recording, was so nefarious and contemptuous as to require reversal under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 * * *" (Pet. App. A-4).[3]

The court of appeals likewise rejected petitioner's claims that his application to take the deposition of Partin was improperly denied (Pet. App. A-4) and that the district court judge should have recused himself[4] (Pet. App. A-5). We rely on the opinions of the district court and the court of appeals, which fully answer each of petitioner's claims here, in urging that the petition for a writ of certiorari be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[3] This issue had been raised and decided in the preceding Section 2255 hearing. On the present second successive application for similar relief, summary denial was especially appropriate. *Sanders* v. *United States*, 373 U.S. 1.

[4] Petitioner alleges that the decision of the First Circuit in *Halliday* v. *United States*, 380 F. 2d 270, conflicts with the holding of the court of appeals on this issue. The court below held that the trial judge was under no obligation to recuse himself simply because certain issues raised in the Section 2255 motion were arguably raised before the trial court on a separate occasion. In *Halliday*, the court held that in Section 2255 petitions alleging an erroneous finding of voluntariness with respect to a guilty plea (Rule 11, Fed. R. Crim. P.), the better practice would be for a judge other than the initial fact-finder on this issue to consider the motion. The holding is thus limited to "factual issues in this particular area" (380 F. 2d at 274), *i.e.*, Section 2255 challenges under Rule 11. Cf. *United States* v. *Zannino*, 468 F. 2d 1299 (C.A. 1). Moreover, the court expressly provided that the sentencing judge could, as here, properly review a Section 2255 petition to conclude that no evidentiary hearing was required on the issue.